United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7221

B/P15

To be argued by
CHARLES SOVEL

In The

United States Court of Appeals

For The Second Circuit

IVANUS MELIOTAS, Administrator & Personal Representative of the Estate of ANTHANASSIOS KARRAS, Deceased,

Plaintiff-Appellant,

vs.

ACTIS COMPANY, LTD., JOHN KARRAS & KARRAS COMPANY, INC.,

Defendants-Appellees.

BRIEF FOR PLAINTIFF-APPELLANT

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Plaintiff-Appellant,

vs.

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Defendants-Appellees.

BRIEF ON BEHALF OF APPELLANT

Statement of Issue Presented for Review

1. Was it not error for the court below to dismiss the action on grounds of forum non conveniens where the forum in which it was contended the action should have been brought would not have provided the relief being sought?

STATEMENT OF THE CASE

Proceedings in the Court below

This is a suit to recover damages arising from the death of Athanassios Karras while employed as a merchant seaman aboard the defendant's vessel, the S.S. "Aquacharm". Suit was instituted under the Admiralty jurisdiction of the District Court. Defendant moved to dismiss the action on grounds of forum non conveniens, which motion was granted by the court below (41a).* This appeal is brought from that dismissal. The opinion below is not yet officially reported but is printed in the Joint Appendix (37a-41a).

Statement of Facts

This is an action to recover damages arising out of the death of Athanassios Karras on July 11, 1973. At the time of his death, Athanassios Karras was employed as a seaman aboard the S.S. "Aquacharm", a vessel owned and operated by the defendant. It is undisputed that the decedent was a Greek citizen, that defendant Actis Company, Ltd. is a Liberian corporation, and that the S.S. "Aquacharm" was registered in the Republic of Liberia and flew the Liberian flag.

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* References are to pages in the Joint Appendix.

As will be set forth more fully in this brief, it is plaintiff's contention that the law of the Republic of Liberia governs this action. The Republic of Liberia has extensive laws relating to maritime matters, and, for purpose of this brief, plaintiff relies on the following provisions of the Liberian Maritime Law:

> Section 2. Liberian Law to Govern Matters Affecting Economy of Liberian Flag Ships.--All matters affecting the economy of Liberian Flag ships, including labour relations, shall be governed by the laws of Liberia.
>
> Section 30. Adoption of General American Maritime Law--Insofar as it does not conflict with any other provisions of this Title, the non-statutory general Maritime Law of the United States of America is hereby adopted as the general Maritime Law of the Republic of Liberia.
>
> Section 320. Shipping Articles Required.--Before the Master of any Liberian vessel of 75 net tons or more shall sail from any port, there shall be in force Shipping Articles (sometimes referred to as articles) with every seaman on board his vessel, except with persons who are apprentices to, or servants of, himself or the vessel's owner. The Shipping Articles shall be written or printed and shall be subscribed by every seaman shipping on the vessel and shall state the period of engagement or voyage or voyages and the term or terms for which each seaman shall be shipped and the rate of pay for each and such other items as may be required by Regulation.
>
> Section 337. Wrongful Death.--Notwithstanding anything contained in Title XVII, whenever the death of a seaman, resulting from an injury, shall be caused by wrongful act, omission, neglect or default occurring on board a vessel,

> the personal representative of the deceased seaman may maintain a suit for damages, for the exclusive benefit of the deceased wife, husband, parent, child or dependent relative, against the vessel, person or corporation which would have been liable if death had not ensued. (23a,25a,26a,28a)

In addition to the foregoing provisions of the Liberian Maritime Law, the Liberian Maritime Regulations provide a required form of ship's Articles for seaman employed aboard Liberian flag vessels. Included in this required form of Articles, is the following provision:

> "16. All rights and obligations of the parties to these articles shall be subject to the Laws and Regulations of the Republic of Liberia." (30a-32a)

In connection with his employment aboard the S.S. "Aquacharm" decedent signed Articles which were in the required form but which contained the following additional clause:

> "Clause
>
> This Contract shall be ruled by the Laws of employee's country. It is particularly emphasized in so far as GREEK Nationals are concerned that together with Greek Laws, the Greek Collective Agreements-as in force for Greek Ships of this class-will also apply.
> It is further stipulated for Greek crews that any claim or dispute arising out of the present Articles and/or Agreement shall be adjudicated by the Greek Courts exclusively." (21a)

Following service of the Complaint, defendant moved to dismiss on grounds of forum non conveniens, contending that the action should have been brought in Greece, and further

contending that the circumstances of plaintiff's death had minimal contacts with the United States and that, in any event, under the clause in the ship's articles set forth above, plaintiff and his personal representative, were required to pursue their remedies solely in the Greek courts.

In response, plaintiff contended that since the S.S. "Aquacharm" was registered in Liberia, the law applicable to the case was the law of Liberia; that under Liberian law, the personal representative of a seaman killed while employed abaord a Liberian flag vessel could sue for damages; that the Greek courts would not apply the Liberian law; that the remedy in the Greek courts was not the remedy to which plaintiff was entitled and which he was seeking in the court below, and that, therefore, the Greek forum was not an "alternative" forum to which the court below could properly defer under the doctrine of forum non conveniens.

By way of reply affidavit, counsel for defendant suggested that plaintiff could have brought his action in Liberia (36a); however, no facts were presented which would demonstrate that the courts of Liberia were in any way a more convenient forum than the Southern District of New York, as the vessel never went to Liberia but did come to various United States ports.

In granting defendant's motion, the court below held that it should not determine the issue of whether Liberian law superseded the Greek Collective Agreement under the circumstances of this case (40a), and held that the fact that the remedy in the Greek courts might be less favorable than the remedy under Liberian law was not in itself, a factor sufficient to justify the assumption of jurisdiction (41a). We will demonstrate in this Brief that the court below erred in abdicating of its responsibility to determine what law was applicable and whether the forum to which it was, in effect, compelling the action to be transferred really was an alternative forum providing the same relief which plaintiff was seeking here.

ARGUMENT

The court below ruled that the mere fact that the remedy available in the Greek courts might be less favorable than that available under the Liberian law was not in itself a factor sufficient to justify the court's assumption of jurisdiction (41a). In disposing of the case on this basis, the court below specifically chose not to make any determination of whether or not plaintiff's claim lay under the Liberian Maritime Law. In so doing, the court below chose not to determine the single most important issue in the application of the doctrine of forum non conveniens, i.e., whether the other, allegedly more convenient forum, truly was an alternative forum in which the plaintiff could realistically vindicate his rights.

The basis on which plaintiff contends that Liberian law is applicable to the instant case and the relevant provisions of the Liberian Maritime Law, are essential to an understanding of why the Greek courts do not provide an alternative forum for the litigation of the instant claim. Accordingly to properly understand why the court below erred, it is necessary to consider (1) the basis on which plaintiff contends that the Liberian Maritime Law applies to this case, (2) the substantive provisions of the Liberian Maritime Law, particularly in relation to the provision in the ship's Articles for application of Greek law, and finally (3) whether, in light of the foregoing factors, the Greek courts truly provided an alternative forum for the litigation of plaintiff's claim.

POINT I

The Maritime Law Of The Republic Of Liberia, Which Was The Law Of The Flag Of The S.S. Aquacharm, Controls This Action.

As early as 1885 the Supreme Court of the United States held that the federal courts, in exercise of their Admiralty jurisdiction, had jurisdiction to try suits between foreigners. The Belgenland, 114 U.S. 355, 367, 5 S. Ct. 860 (1885); see Rodriguez v. Pan American Life Ins. Co., 311 F. 2d 429 (5th Cir. 1962). While considerations of forum non conveniens may, in particular cases, dictate that a court exercise its discretion to decline an existing jurisdiction, the doctrine of forum non conveniens in no way challenges the initial existence of jurisdiction. Thus, since personal service has been obtained on the defendant, the jurisdiction of the District Court to try the instant action is clear and is not challenged by defendant.

Once jurisdiction has been established application of the doctrine of forum non conveniens depends upon there being another forum available which is competent to try the litigation both with respect to jurisdiction over the parties and the subject matter of the action, Gulf Oil Corporation v. Gilbert, 330 U.S. 501, 506-507,67 S. Ct. 839, 842 (1947); see Slater v. Mexican National R. Co., 194 U.S. 120, 24 S. Ct. 58 (1904). It therefore is necessary, in the first instance, to determine what law governs the transaction in question, following which it then can be determined whether the forum in whose favor it is sought that jurisdiction be declined under forum non conveniens really is an alternative forum competent to grant the relief being sought.

The leading case on determining the applicable law to actions involving injuries to merchant seamen is Lauritzen v. Larsen, 345 U.S. 571, 73 S. Ct. 921 (1953). Lauritzen v. Larsen, listed seven factors to be weighed in determining the applicable law in such cases. These are:

(1) Place of the wrongful act.

(2) Law of the flag of the vessel.

(3) Allegiance and domicile of the injured party.

(4) Allegiance of the defendant shipowner.

(5) Place of contract.

(6) Inaccessibility of foreign forum.

(7) The law of the forum.

Lauritzen v. Larsen, and the myriad of cases which have followed in its wake, have made it clear that these seven factors were not to be applied mechanically nor were they of equal weight. Of the seven factors, the second--the law of the flag of the vessel--is far and away the most important. The importance of the law of the flag was emphasized by the Supreme Court in Lauritzen v. Larsen, supra, as follows, 345 U.S. at 584-586, 73 S. Ct. at 929-930:

> "2. Law of the Flag--Perhaps the most venerable and universal rule of maritime law relevant to our problem is that which gives cardinal importance to the law of the flag. Each state under international law may determine for itself the conditions on which it will grant its nationality to a merchant ship, thereby accepting responsibility for it and acquiring authority over it. Nationality is evidenced to the world by the ship's papers and its flag. The United States has firmly and successfully maintained that the regularity and validity of a registration can be questioned only by the registering state.

This Court has said that the law of the flag supersedes the territorial principle, even for purposes of criminal jurisdiction of personnel of a merchant ship, because it 'is deemed to be a part of the territory of that sovereignty (whose flag it flies), and not to lose that character when in navigable waters within the territorial limits of another sovereignty.' On this principle, we concede a territorial government involved only concurrent jurisdiction of offenses aboard our ships. United States v. Flores, 289 U.S. 137, 155-159 53 S. Ct. 580, 584-586, 77 L. Ed. 1086, and cases cited. Some authorities reject, as a rather mischievous fiction, the doctrine that a ship is constructively a floating part of the flag-state, but apply the law of the flag on the pragmatic basis that there must be some law on shipboard, that it cannot change at every change of waters, and no experience shows a better rule than that of the state that owns her.

It is significant to us here that the weight given to the ensign overbears most other connecting events in determining applicable law. As this Court held in United States v. Flores, supra, 289 U.S. at page 158, 53 S. Ct. at page 586, and iterated in Cunard S.S. Co. v. Mellon, supra, 262 U.S. at page 123, 43 S. Ct., at page 507:

> 'And so by comity it came to be generally understood among civilized nations that all matters of discipline, and all things done on board, which affected only the vessel, or those belonging to her, and did not involve the peace of dignity of the country, or the tranquility of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation, or the interests of its commerce should require.***

This was but a repetition of settled American doctrine.

> These considerations are of such weight in favor of Danish and against American law in this case that it must prevail unless some heavy counterweight appears." (Emphasis supplied)

See also Tjonaman v. A/S Glittre, 340 F. 2d 290, cert. denied, 381 U.S. 911 (1965).

As indicated in Lauritzen v. Larsen, supra, the law of the flag is "of cardinal importance" and, in the absence of compelling reasons for rejecting it, is itself determinative of the applicable law. In the instant case the S.S. "Aquacharm" was registered in and flew the flag of the Republic of Liberia. This would dictate that the law of the Republic of Liberia controls this case.

Defendant has not advanced any "compelling reasons" why Liberian law should not be applied; however, lest there be any doubt, we will discuss the remaining six factors listed in Lauritzen v. Larsen as they serve only to confirm Liberian law as being the correct choice of law governing these actions.

Place of the wrongful act--Here the accident occurred at sea. Lauritzen v. Larsen recognized that this factor was of limited significance to shipboard torts, see 345 U.S. at 583, 73 S. Ct. at 929, because of the mobility of ships with locale at the time of an accident being largely fortuitous.

Allegiance or domicile of the injured--Here the decedent and the plaintiff are Greek nationals. However, plaintiff is not the party seeking to have Greek law control this action.

While Lauritzen v. Larsen recognized that the forum country might, in certain circumstances, retain jurisdiction to protect its own nationals, in the absence of such considerations, the domicile of the injured party is not a basis for rejecting the application of the law of the flag.

Allegiance of the defendant shipowner--Here the shipowner is a Liberian Corporation, and we submit, defendant's incorporation in Liberia and the registering of the vessel there is sufficient to estop defendant from arguing against the applicability of Liberian law.

Place of contract--Here the decedent signed Articles aboard the ship in Amsterdam. However, no one is contending that Dutch law applies to this action. Moreover, the Shipping Articles which the decedent signed specifically provided:

> "16. All rights and obligations of the parties to these Articles shall be subject to the Laws and Regulations of the Republic of Liberia."

In any event, as the Supreme Court noted in Lauritzen v. Larsen, supra, the place of contract is not a substantial factor in determining applicable law. Said the Court, 345 U.S. at 589, 73 S. Ct. at 932:

> "We do not think the place of contract is s substantial influence in the choice between competing laws to govern a maritime tort."

Inaccessibility of foreign forum--This point will be more fully discussed in Point III of this Brief. From plaintiff's

standpoint the problem is not one of inaccessibility insofar as geographic proximity is concerned, but rather that the foreign forum proposed is not an alternative forum which is competent to grant the relief which plaintiff is seeking.

Law of the forum--Insofar as choice of law is concerned, as distinguished from application of the doctrine of forum non conveniens, the law of the forum is of limited importance. As the Supreme Court stated in Lauritzen v. Larsen, supra, 345 U.S. at 591, 73 S. Ct. at 932:

> "Jurisdiction of maritime cases in all countries is so wide and the nature of its subject matter so far flung that there would be no justification for altering the law of a controversy just because local jurisdiction of the parties is obtainable."

In the instant case, the application of the law of the forum would not require any deviation from the law of the vessel's flag for the Liberian Maritime Law specifically adopts the nonstatutory general maritime law of the United States of America (Liberian Maritime Law, Section 30) (26a) and provides a remedy for wrongful death similar to that provided by American law (Liberian Maritime Law, Section 337) (28a).

All of the foregoing considerations dictate the conclusion that the law of the vessel's flag--the Maritime Law of the Republic of Liberia--is applicable to this action. We turn now to a consideration of provisions of the Liberian Maritime Law which are relevant to this action.

POINT II

Under Liberian Law the Personal Representative of Deceased Seaman May Recover Damages For Death Resulting From Negligence of Unseaworthiness. Any Agreement Waiving This Right Would Be Void.

It is clear that under Liberian law the right of the personal representative of a deceased seaman to recover damages for death resulting from negligence or unseaworthiness is the same as under American law. By statute the Republic of Liberia has specifically adopted the non-statutory general maritime law of the United States. Section 30 of the Liberian Maritime Law provides:

> "Section 30. Adoption of General American Maritime Law.--Insofar as it does not conflict with any other provisions of this Title, the non-statutory general Maritime Law of the United States of America is hereby declared to be and is hereby adopted as the general Maritime Law of the Republic of Liberia." (26a)

In addition, even prior to the Supreme Court's decision in Moragne v. States Marine Lines, 398 U.S. 375 (1970), Liberian law provided a broad remedy for wrongful death. Thus, Section 337 of the Liberian Maritime Law provides:

> "Section 337. Wrongful Death.--Notwithstanding anything contained in Title XVII, whenever the death of a seaman, resulting from an injury, shall be caused by wrongful act, omission, neglect or default occurring on board a vessel, the personal representative of the deceased seaman may maintain a suit for damages, for the exclusive benefit of the deceased's wife, husband, parent, child or dependent relative, against the vessel, person or corporation which would have been liable if death had not ensued." (28a)

Moreover, the Liberian Maritime Law requires that Liberian law apply to Liberian flag vessels. Thus, Section 2 of the Liberian Maritime Law provides:

> "Section 2. Liberian Law to Govern Matters Affecting Economy of Liberian Flag Ships. All matters affecting the economy of Liberian Flag ships, including labour relations, shall be governed by the laws of Liberia." (25a)

In addition, Section 320 of the Liberian Maritime Law requires that all Liberian vessels of 75 net tons or more maintain in force Shipping Articles in the form required by Regulation, and the form required by the Liberian Maritime Regulations (Section 10:320(4) provides:)

> "16. All rights and obligations of the parties to these Articles shall be subject to the Laws and Regulations of the Republic of Liberia." (32a)

Articles in the required form were in force for the S.S. "Aquacharm" and had been signed by the instant decedent.

Even though the articles signed by the decedent contained the provision required by the Liberian Maritime Regulations, they also contained a clause which purports to require that, as to Greek Nationals, Greek law and the Greek Collective Agreements apply. This provision, we submit, is void as against public policy.

As we have previously noted, the Liberian Maritime Law adopts the non-statutory general maritime law of the United States. Numerous American cases have rejected attempted waivers

of applicable statutory law. Illustrative is Blanco v. Phoenix Compania de Navegacion, S.A., 304 F.2d 13 (4th Cir. 1962). In Blanco, the plaintiff was a Spanish national injured aboard a Liberian flag vessel. It was argued that his right to recover for a leg amputation was limited to $1,800 pursuant to a provision in the ship's articles limiting recovery for injury. In rejecting this argument and sustaining an award of $75,000, the Court stated, 304 F.2d at 15-16:

> "On examination of the contract in the present case, its inequity is manifest. In return for the absolute right to recover negligible damages, the seaman surrendered his substantial right to recover full indemnity for any loss or damages suffered in consequence of the unseaworthiness of his ship. An admiralty court would be derelict in its duty were it to honor this agreement. We hold it invalid as a matter of law.
>
> Moreover, certain decisions go further, strongly indicating that any attempt whatever by a ship to limit its liability to a seaman under the General Maritime Law is against public policy and ipso facto void, irrespective of the fairness of the terms of the agreement. This is the express holding of W. J. McCahan Sugar Refining & Molasses Co. v. Stoffel, 41 F.2d 651, 653-654 (3d Cir. 1930) (post-accident agreement that state workman's compensation shall be the seaman's sole remedy); Schellenger v. Zubik, 170 F. Supp. 92, 92 (W.D. Pa. 1959) (agreement to accept state workman's compensation); Vitco v. Joncich, 130 F. Supp. 945, 950-952 (S.D. Cal. 1955) (contract providing that seaman's right to wages ended if he became ill during the voyage; excellent collection of cases); Lakos v. Saliaris, 116 F. 2d 440, 443-444 (4th Cir. 1940) (agreement modifying seaman's right to full wages at the end of the voyage contrary to United States statutory law); Retzekas v. Vygla S.S., 193 F. Supp. 259 (D.R.I. 1960) (contract

providing that personal injury claims of seamen shall be governed by Greek Law.)

These authorities are not without support in the Supreme Court. In Cortes v. Baltimore Insular Lines, 287 U.S. 367, 371, 53 S. Ct. 173, 77 L. Ed. 368 (1932), Justice Cardozo, after discussing the duty imposed by the law upon a ship to provide, as an incident of the employment, maintenance and cure to a seaman who falls ill during a voyage and to indemnify him for loss or damage caused by an unseaworthy condition, states categorically: '(G)iven the relation, no agreement is competent to abrogate the incident.' Again, in Lauritzen v. Larsen, 345 U.S. 571, 589, 73 S. Ct. 921, 97 L. Ed. 1254 (1953), though holding that the application of foreign law was proper in a suit between a foreign seaman and a foreign ship, the Court said: 'We think a quite different result would follow if the contract (of employment) attempted to avoid applicable law***.'

Literally interpreted, these cases suggest that the private compensation agreement in the present case would be unenforceable even if it afforded the seaman an adequate allowance for his concession. Here, however, we need not to so far, having concluded that the agreement is unenforceable for want of sufficient consideration." (Emphasis supplied)

Nor does the clause requiring disputed be resolved in Greek courts under Greek law operate to preclude plaintiff's remedy under Liberian law, for an agreement not to apply the law of the vessel's flag is invalid. This precise point was considered by the Supreme Court in Lauritzen v. Larsen, supra, as follows, 345 U.S. at 589, 73 S. Ct. at 931-932:

> "We are aware of no public policy that would prevent the parties to this contract, which contemplates performance in a multitude of territorial jurisdictions and on the high seas, from so settling upon the law of the flag-state as their governing code. This arrangement is so natural and compatible with the policy of law that even in the absence of an express provision it would probably have been implied. The Belgenland, 114 U.S. 355, 367, 5 S. Ct. 860, 865, 29 L. Ed. 152; The Hanna Nielson, 2 Cir., 273 F. 171. We think a quite different result would follow if the contract attempted to avoid applicable law, for example, so as to apply foreign law to an American ship." (Emphasis supplied)

It follows from the foregoing that plaintiff is entitled to sue for damages under the Liberian Maritime Law and that his right is in no way limited by any contrary provisions of the ship's Articles or the contract of employment.

POINT III

The Doctrine Of Forum Non Conveniens Is Not Applicable To This Case As There Is No Other, More Conveneint, Forum With Jurisdiction To Decide The Case.

Fundamental to the application of the doctrine of forum non conveniens is the existence of two forums with jurisdiction to try the case. Thus, in Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 506-507, 67 S. Ct. 842, the Court stated:

> "In all cases where the doctrine of forum non conveniens comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them."

Gulf Oil v. Gilbert, supra, listed several factors to be considered in applying the doctrine of forum non conveniens, all of which are designed to determine the relative obstacles and advantages to a fair trial in the forums under consideration, 330 U.S. at 508, 67 S. Ct. 839. There is no set formula for application of the doctrine which rather rests on the exercise of sound judicial discretion. Illustrative is Rodriguez v. Pan American Life Ins. Co., 311 F. 2d 429 (5th Cir. 1962), where the Court, in reversing a lower court's dismissal on grounds of forum non conveniens, recognized the practical difficulties that would confront Cuban refugees if they were relegated to a remedy in the Cuban courts. Said the Court, 311 F. 2d at 433:

> "In 1885 the Supreme Court held that the trial courts have jurisdiction even of a suit between two foreigners 'and that they will exercise it unless special circumstances exist to show that justice would be better subserved by declining it.' The Belgenland, 114 U.S. 355, 367, 5 S. Ct. 860, 29 L. Ed. 152 (1885). In 1956 Judge Tuttle, speaking for this court reversed a district court which had dismissed in favor of a foreign court, saying: 'Instead of the rule being, as the trial court here stated, that jurisdiction should be denied unless such denial would work an injustice, the rule is, rather, that jurisdiction should be taken unless to do so would work an injustice.' Motor Distributors, Ltd. v. Olaf Pedersen's Rederi A/S, 239 F. 2d 463, 465 (5th Cir. 1956). This year a district court observed that forum non conveniens 'is a harsh rule and is applied in rather rare cases***'. Glicken v. Bradford, supra.

> Defendant, under this test, must show that these plaintiffs, refugees from Castro's Cuba, can obtain justice in the courts of Cuba. The law does not impose upon these Cuban refugees, any more than any other plaintiff, the burden of proving that they would have problems of health or legal difficulties in token, we need not and do not embark upon an international sea of judicial notice of the treatment of those who flee their native land and return to Castro's jurisdiction to contest their property rights with a Louisiana corporation.
>
> A recent case from the Court of Appeals for the District of Columbia is close in point. North Branch Products, Inc. v. Fisher, 109 U.S. App. D.C. 182, 284 F. 2d 611 (1960), cert. den. 365 U.S. 827, 81 S. Ct. 713, 5 L. Ed 2d 705. There the district court had dismissed an action on the ground that either a Michigan state court or a court in Canada would be a more convenient forum. This was reversed the appellate court finding that the jurisdiction of a defendant would not be obtained in Michigan and said there was no certainty that a Canadian court would assume jurisdiction of the action. The court cited Gulf Oil Corp. v. Gilbert, supra, as authority for the proposition that there must be a clear showing that an alternative forum exists. It was held erroneous to dismiss in the absence of such clear showing.
>
> There is no such showing on the record before us. The District Court's ruling dismissal on grounds that Cuba would be a more convenient forum was error because the standards discussed here were improperly applied to the established facts." (Emphasis supplied)

See also Domingo v. States Marine Lines, 340 F. Supp. 811, 814 (S.D.N.Y. 1972); McCarthy v. Canadian National Railway, 322 F. Supp. 1197, 1199 (D.C. Mass. 1971).

Notwithstanding the clear holdings of the foregoing cases, the court below chose not to determine what

law was applicable to the case or whether the Greek courts truly provided an alternative forum for the litigating of plaintiff's claim under that law. Instead, the court below held that the fact that the law in Greece might be less favorable was "not in itself a factor sufficient to justify this court's assumption of jurisdiction" (41a), citing Fitzgerald v. Zim Israel, 1975 A.M.C. 1425, 1430 (S.D.N.Y. 1975). However, Fitzgerald v. Zim Israel, supra, is in no way authority for what the court below did in the instant case. Fitzgerald v. Zim Israel holds only that the fact that American law might be more favorable than foreign law is no reason for applying American law to a case where the factors set forth in Lauritzen v. Larsen, supra, would dictate the selection of foreign law. In Fitzgerald v. Zim Israel, supra, the law of vessel's flag was Israeli law, and the court held that that law should apply even though it might be less liberal than American law. Fitzgerald v. Zim Israel, supra, does not hold that a court can ignore the law of the vessel's flag and defer to a foreign jurisdiction when, as in the instant case, the law that will be applied in that foreign jurisdiction is different from the law which would be applicable under the principles set forth in Lauritzen v. Larsen, supra.

We respectfully submit that a District Court, sitting in Admiralty, cannot abdicate its function of determing what

law applies to a maritime cause of action over which it has jurisdiction. While the court below may have felt that it was undesirable for it to determine the application of the Liberian Maritime Law to the facts of the instant case, it simply could not refuse to make this determination, for such a refusal to decide when coupled with the dismissal for forum non conveniens is, itself, a decision that Greek law should apply rather than Liberian law. Thus, the decision below, rather than merely being a determination with respect to the most desirable forum to litigate this case, actually constituted a determination that Greek law applied, thereby depriving plaintiff of substantial rights. Accordingly, the court below erred in dismissing the action on grounds of forum non conveniens.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the decision below dismissing the action on the grounds of forum non conveniens should be reversed and the case remanded with directions to retain jurisdiction.

Respectfully submitted,

ABRAHAM E. FREEDMAN
Attorney for Appellant

Of Counsel:

Charles Sovel

AFFIDAVIT OF SERVICE

Re:76-7221
Meliotas v. Actis Co., Ltd.

STATE OF NEW JERSEY :
: ss.:
COUNTY OF MIDDLESEX :

I, Muriel Mayer , being duly sworn according to law, and being over the age of 21 upon my oath depose and say that: I am retained by the attorney for the above named Plaintiff-Appellant .

That on the 1st day of July , 1976, I served the within Joint Appendix & Brief in the matter of Ivanus Meliotas v. Actis Co., Ltd. ,

upon Darby, Healey & Stonebridge, Esqs.
19 Rector Street, New York, New York 10006

by depositing two (2) true copies of each of the same securely enclosed in a post-paid wrapper, in an official depository maintained by the United States Government.

Muriel Mayer
Muriel Mayer

Sworn to and subscribed
before me this 1st day
of July 1976.

Lorraine Leotta
A Notary Public of the
State of New Jersey.

LORRAINE LEOTTA
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires April 13, 1977